SUPREME COURT, U. S.
NOV 6 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-559

LEE ANDREW JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

VARON, STAHL and KAY, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020
Attorneys for Petitioner

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Supreme Court
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United States

OCTOBER TERM, 1974

NO. _____

LEE ANDREW JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Lee Andrew Johnson, prays that a writ of certiorari be issued to review the judgment of the

Supreme Court of Florida entered on October 11, 1974, denying his petition for rehearing thereby affirming the judgment of the Supreme Court of Florida on May 28, 1974, wherein that Court denied his petition for rehearing of certiorari thereby affirming the judgment of the Fourth District Court of Appeal of the State of Florida which itself affirmed petitioner's conviction in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, rendered on February 21, 1973.

JUDGMENT AND OPINION OF THE COURT BELOW

The order of the Supreme Court of Florida on October 11, 1974, is set out in Appendix A attached to this Petition. The order of the Supreme Court of Florida denying certiorari is set out in Appendix B attached to this Petition.

The decision of the District Court of Appeals for the Fourth District is set out in Appendix C attached to this Petition. The judgment of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida is set out in Appendix D.

JURISDICTION OF THIS COURT

1. The date of the judgment sought to be reviewed and the time of its entry is May 28, 1974.

2. A timely filed petition for rehearing was denied on October 11, 1974, thereby making this Petition timely filed.

3. The jurisdiction of this Court is invoked under Title 28, U.S. Code, Section 1257 (3) and Rule 22 (1) of the Rules of this Court.

QUESTION PRESENTED FOR REVIEW

Were the petitioner's rights to a fair trial as guaranteed by the Fifth Amendment to the United States Constitution as made applicable to the State of Florida by the Fourteenth Amendment to the United States Constitution, violated when pursuant to Florida Rules of Criminal Procedure 3.140(n) a request for bill of particulars was filed and the State filed a bill of particulars stating that the only people present during an alleged sale were another witness and a confidential informant; yet at the time of trial brought forth two State witnesses who were also allegedly present and the court refused to exclude the testimony of these two witnesses.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

(The pertinent provisions are set out in Appendix E of this Petition.)

STATEMENT OF THE CASE

An Information was filed against the petitioner on May 10, 1972, for one count of sale of heroin. On May 26, 1972, the petitioner filed a motion for statement of particulars asking two questions, to-wit: (1). Please state who was present when the alleged sale of heroin took place and; (2). Please state the exact time and location of the alleged sale. This request for statement of particulars

was made pursuant to Florida Rules of Criminal Procedure 3. 140 (n) which was in full force and effect on June 2, 1972. A copy of said Rule is set out in Appendix F attached to this Petition. A copy of the motion for statement of particulars dated May 26, 1972, is set out in Appendix G attached to this Petition.

On June 2, 1972, the State Attorney filed his bill of particulars in regard to whom was present when the alleged sale took place and answered, "Agent James Thomas, BCNDDIEU, and confidential informant present when alleged sale of heroin took place." A copy of the bill of particulars dated June 2, 1972, is set out in Appendix H attached to this Petition.

The case proceeded to trial on February 21, 1973. At the time of trial the State called as witnesses, not only James Thomas, but two other witnesses who claimed that they were present and observed aspects of the alleged sale. Before they testified, defense counsel asked the court to exclude these witnesses. This is because the action of the State of Florida was unfair and deprived defense counsel of an opportunity to prepare a proper defense.

The court denied the motion and the petitioner was found guilty and sentenced to five years in the State Prison.

On April 12, 1973, a notice of appeal was filed with the District Court of Appeals for the Fourth District. Petitioner filed his brief in the Fourth District Court of Appeal noting as its first question of law involved:

DID THE COURT COMMIT ERROR WHEN IT DID NOT EXCLUDE THE TESTIMONY

OF TWO STATE WITNESSES WHO WERE PRESENT DURING THE ALLEGED SALE OF HEROIN WHEN THE STATE HAD PREVIOUSLY FILED A BILL OF PARTICULARS CLAIMING THAT THE ONLY PEOPLE WHO WERE PRESENT WERE ANOTHER WITNESS AND A CONFIDENTIAL INFORMANT?

A copy of the pertinent page of petitioner's brief is set out in Appendix I attached to this Petition.

On March 8, 1974, the District Court of Appeal for the Fourth District entered its order confirming the conviction of the petitioner thereby adversely deciding for petitioner the Federal question raised. This order is set out in Appendix C attached to this Petition.

On March 21, 1974, petitioner filed his petition for writ of certiorari to the District Court of Appeal, Fourth District, raising again the Federal question raised in this petition. A copy of the pertinent portion of this pleading demonstrating that the Federal question was raised in the Supreme Court of Florida is attached to this Petition as Appendix J.

On May 28, 1974, the Supreme Court of Florida by a four to three vote denied petitioner's writ of certiorari and thereby adversely decided for the petitioner the Federal question. The order of the Supreme Court of Florida to this effect is set out in Appendix B attached to this Petition.

On October 11, 1974, the Supreme Court of Florida denied petitioner's petition for rehearing by a four to three vote.

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

PETITIONER'S RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS MADE APPLICABLE TO THE STATE OF FLORIDA BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN PURSUANT TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.140 (n) A REQUEST FOR BILL OF PARTICULARS WAS FILED AND THE STATE FILED A BILL OF PARTICULARS STATING THAT THE ONLY PEOPLE PRESENT DURING AN ALLEGED SALE WERE ANOTHER WITNESS AND A CONFIDENTIAL INFORMANT; YET AT THE TIME OF TRIAL BROUGHT FORTH TWO STATE WITNESSES WHO WERE ALSO ALLEGEDLY PRESENT AND THE COURT REFUSED TO EXCLUDE THE TESTIMONY OF THESE TWO WITNESSES.

The Florida Supreme Court has promulgated pursuant to achieving a fair trial certain rules of discovery whereby a defendant is allowed to get information from the State in regard the case against him and thereby help to prepare a defense.

In this regard, Florida Rule of Criminal Procedure 3.140 (n) which was in full force and effect on June 2, 1972, states:

> (n) Statement of Particulars: The court, upon motion, shall order the prosecuting attorney to furnish a statement of particulars, when the indictment or information upon which the defendant is to be tried fails to inform the defendant of the particulars of the offense *sufficiently to enable him to prepare his defense.* Such statement of particulars shall specify as definitely as possible the place, date, *and all other material facts of the crime charged* that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. *Reasonable doubts concerning the construction of this rule shall be resolved.* (Emphasis added)

The pertinent portions of Rule 3. 140 (n) are attached to this Petition as Appendix F.

Pursuant to that Rule the petitioner filed a motion for statement of particulars requesting the prosecutor to state who was present when the alleged sale of heroin took place. A copy of this motion is attached to this Petition as Appendix G.

Based upon this pleading filed on June 2, 1972, the State took the position that the only people present when the alleged sale took place was an Agent James Thomas and a confidential informant. A copy of this pleading filed by the State is attached to this Petition as Appendix H.

The confidential informant was never called to testify at the trial but Agent Thomas testified as to the alleged transaction.

During the course of the trial another agent, Lindsay, testified that he was, in fact, present a car length away (TR. 54), during the time when the sale occurred.

When this came to light, defense counsel asked to have the jury removed and raised the question of the witness testifying.

Agent Lindsay testified that he observed the petitioner, another black male, the confidential informant and Agent Thomas exit an apartment and that he observed the black male hand an item to Agent Thomas. He further testified that Agent Thomas handed the black male "something" and observed the black male hand the petitioner something (TR. 53). Further in his testimony he testified that the petitioner appeared to be counting something out (TR. 68).

This episode was placed in time at exactly the same point that Agent Thomas said the sale of heroin occurred. Nevertheless, the court refused to consider Agent Lindsay present at the sale (TR. 55).

> THE COURT: Of course, there is always a possibility that in the future you could always argue he wasn't present at a sale; he didn't see a sale. I mean it is sort of a two-edged sword. It's in the middle. Is he present or is he not present? They took it to be actual presence. I don't think it has to be stricken. A witness list could have been provided. You could have taken depositions of the witnesses. As to the actual presence at the sale or knowledge of a sale, he is not testifying, apparently, to any such thing. He is only saying

> what he observed. He can't testify as to what was in the package, or the money, or anything like that. He is only testifying as to the people that he observed, but your Motion is preserved for the record, and properly so, but your request and Motion is denied.
>
> Escort the jury in."

The purpose as spelled out in the Rules for Bill of Particulars is to fully furnish a defendant with things which are necessary for his defense.

It is patently obvious that the Bill of Particulars filed on June 2, 1972, is misleading and unfair in that it gives the impression that there were only two people present; one of them being a confidential informant.

As the court pointed out, depositions could have been taken if the petitioner was aware that there were, in fact, other witnesses present.

The State, however, was not simply content with this. They then called Agent Clark who testified to basically the same testimony as that of Agent Lindsay. Agent Clark was in the same car as Lindsay (TR. 79) and a perusal of the testimony clearly shows that she was actually present during the time when the alleged sale of heroin took place.

It is the duty of the State when filing a bill of particulars to provide certain information. It is bad enough when the State does not disclose information about the case but when the information that is disclosed is errone-

ous and misleading, it is fundamental fairness that the State be bound by their previous enunciations.

The petitioner should have a right to a trial where he is aware of his accusers.

Petitioner admits that he is relying upon a State Rule of Criminal Procedure but submits that once the Rule has been promulgated and both the prosecution and defendant rely on it, to allow the State to mis-use and corrupt the purpose of the Rule by leaving out the names of certain witnesses and then calling them at the trial clearly violates the defendant's rights to a fair trial as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution.

Petitioner submits that if the Supreme Court of Florida will not enforce the rules it has promulgated, it is the duty of the United States Supreme Court to cause this to happen where Federal Constitutional rights to a fair trial are involved.

It is elementary that when the State so clearly misleads an accused as to what witnesses will be called against him, it cannot be said he was given a fair trial.

In the case of *Niemotko v. Maryland*, 340 U.S. 268, this Honorable Court held:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of the lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

Petitioner submits that a filing of a false and misleading bill of particulars is tantamount to the suppression of the evidence favorable to the accused.

In the case of *Napue v. Illinois*, 360 U.S. 264, this Honorable Court stated that a conviction cannot stand when the State, although in soliciting false evidence, allows it to go uncorrected when it appears.

In the celebrated case of *Brady v. Maryland*, 373 U.S. 83, this Honorable Court through Mr. Justice Douglas, had opportunity to deal with the principle of a fair trial.

> "The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals."

In the case at bar the misdeeds of the prosecutor clearly caused an unfair trial to the petitioner. The principles as enunciated in *Brady v. Maryland, supra,* therefore, applied.

Convictions should not be obtained by trickery but rather by use of a fair trial to every defendant.

Petitioner prays that this Honorable Court grant its writ of certiorari to determine if the State may make use of the Criminal Procedure Rules by twisting and misleading a defendant and, therefore, denying him his constitutional rights to a fair trial under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

It is respectfully submitted that the Petition for writ of certiorari should be granted and the judgments reversed.

Respectfully submitted,

VARON, STAHL and KAY, P. A.
Attorneys for Petitioner
2432 Hollywood Boulevard
Hollywood, Florida 33020

By: _____
EDWARD M. KAY

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1974

FRIDAY, OCTOBER 11, 1974

CASE NO. 45,245

LEE ANDREW JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On consideration of the Petition for Rehearing filed by attorneys for petitioner and the response thereto,

IT IS ORDERED that said petition is denied, and it is further

ORDERED that the motion of petitioner to stay mandate is hereby granted and proceedings in this Court and in the District Court of Appeal, Fourth District and in the Circuit Court in and for Broward County, Florida are hereby stayed to and including November 11, 1974 to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

ADKINS, C.J., ROBERTS, DEKLE and OVERTON, JJ., concur
ERVIN, BOYD and McCAIN, JJ., dissent

A True Copy

TEST:

Y
CC: Hon. Edward M. Kay
Hon. George Georgieff
Hon. C. Marie Bernard
Hon. E. J. Comiskey, Clerk
Hon. Clyde L. Heath, Clerk
Hon. Robert W. Tyson, Jr., Judge

Sid J. White
Clerk Supreme Court.

APPENDIX B

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1974

TUESDAY, MAY 28, 1974

CASE NO. 45,245

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

73-464

LEE ANDREW JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., ROBERTS, DEKLE and OVERTON, JJ., concur
ERVIN, BOYD and McCAIN, JJ., dissent

C

cc: Hon. Emmett J. Comiskey, Clerk
Hon. Clyde L. Heath, Clerk
Hon. Robert W. Tyson, Jr., Judge
Hon. Edward M. Kay
of Varon, Stahl and Kay, P.A.
Hon. C. Marie Bernard

A True Copy

TEST:

/s/ Sid J. White

SID J. WHITE
Clerk Supreme Court.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 1974

CASE NO. 73-464.

LEE ANDREW JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed March 8, 1974.

Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge.

Edward M. Kay of Varon Stahl and Kay, P.A., Hollywood, for appellant.

Robert L. Shevin, Attorney General, Tallahassee, and C. Marie Bernard, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We have carefully considered the points raised on appeal and upon examination of the record are of the opinion that reversible error has not been demonstrated. Although the information contained in the state's bill of

particulars was lacking in completeness we cannot conclude that this error or omission injuriously affected the substantial rights of the defendant. However, we would point out somewhat critically that the spirit and intent of Rule 3.140(n) is not furthered when the state's response is unduly restrictive. Accordingly, the final judgment of conviction and sentence is affirmed.

AFFIRMED.

WALDEN, MAGER, and DOWNEY, JJ., concur.

APPENDIX D

BOOK 271 PAGE 668

IN THE CIRCUIT COURT IN AND
FOR BROWARD COUNTY, FLORIDA

Case Number F72-15013Y

Sheriff's Number 72-7908

STATE OF FLORIDA
vs.

LEE ANDREW JOHNSON

JUDGMENT

You, LEE ANDREW JOHNSON, having (x) been tried and found guilty of Sale of Heroin the Court now adjudges you to be guilty of said crime. And it is,

Ordered And Adjudged that Sentence be deferred until April 12, 1973 @ 1:30 P.M.

DONE AND ORDERED in open Court at Fort Lauderdale, Broward County, Florida, this 21 day of February, 1973.

Signature Illegible

Judge

STATE OF FLORIDA, BROWARD COUNTY

This instrument filed for record 22nd day February, 1973 and recorded MINUTES CIRCUIT COURT 271 page 668 Record Verified.

CLYDE L. HEATH, Clerk
By B. B. Sipp, D.C.

APPENDIX E

Amend. 5 CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

Rule 3.140

RULES OF CRIMINAL PROCEDURE

(n) Statement of Particulars. The court, upon motion, shall order the prosecuting attorney to furnish a statement of particulars, when the indictment or information upon which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense. Such statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.

APPENDIX G

IN THE COURT OF RECORD IN AND FOR BROWARD COUNTY, FLORIDA

No. F 72-15013-X (Tyson)

STATE OF FLORIDA,

Plaintiff,

vs.

LEE ANDREW JOHNSON,

Defendant.

MOTION FOR STATEMENTS OF PARTICULARS

The defendant, Lee Andrew Johnson, respectfully shows unto this Court that the Information filed in this cause fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense, and therefore, pursuant to F.R.Cr.P. 3.190(n), the defendant requests this Court to order the State to furnish the following particulars:

1. Please state who was present when the alleged sale of heroin took place.

2. Please state the exact time and location of the alleged sale.

I hereby certify that a copy of the foregoing was furnished the State Attorney's Office, Broward County Courthouse, Fort Lauderdale, Florida, this 26 day of May, 1972.

VARON, STAHL and KAY, P.A.
Attorneys for Defendant
2432 Hollywood Boulevard
Hollywood, Florida 33020
Telephone: 923-1548

By: Edward M. Kay

EDWARD M. KAY

APPENDIX H

IN THE COURT OF RECORD IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 72-15013X

JUDGE: TYSON

STATE OF FLORIDA,

Plaintiff

vs.

LEE ANDREW JOHNSON,

Defendant

BILL OF PARTICULARS

COMES NOW the State of Florida by and through the undersigned Assistant State Attorney and pursuant to that certain Motion for Bill of Particulars on file herein, states that the exact time, date, and place of the offense charged are as follows:

1. Agent James Thomas, BCNDDIEU, and confidential informant present when alleged sale of heroin took place.

2. Within three hours earlier or later than 9:36 p.m. on the 18th day of February, 1972, at or near 2400 Block of N.W. 8th Court, Fort Lauderdale, Florida.

3. The Defendant is on notice that the State invokes its rights to reciprocal discovery pur-

suant to Rule 1.220(c) as to any tangible objects, scientific or medical reports, books, papers, and any other documents the Defendant intends to produce at the trial which are in his possession, custody, or control. The State submits that it is entitled to inspect, copy or photograph the same pursuant to the above-mentioned Rule, and its sub-section.

PHILIP S. SHAILER
State Attorney

By: /s Peter F. K. Baraban
PETER F. K. BARABAN
Assistant State Attorney

I HEREBY CERTIFY that a copy of the foregoing was mailed to EDWARD M. KAY, Attorney for Defendant, at 2432 Hollywood Boulevard, Hollywood, Florida 33020, this 2 day of June, 1972.

/s Peter F. K. Baraban
PETER F. K. BARABAN
Assistant State Attorney

APPENDIX I

ARGUMENT

POINT I

DID THE COURT COMMIT ERROR WHEN IT DID NOT EXCLUDE THE TESTIMONY OF TWO STATE WITNESSES WHO WERE PRESENT DURING THE ALLEGED SALE OF HEROIN WHEN THE STATE HAD PREVIOUSLY FILED A BILL OF PARTICULARS CLAIMING THAT THE ONLY PEOPLE WHO WERE PRESENT WERE ANOTHER WITNESS AND A CONFIDENTIAL INFORMANT?

Florida Rules of Criminal Procedure 3.150, which was in full force and effect on June 2, 1972, when the State filed its Bill of Particulars states as follows:

> (n) Statement of Particulars: The court, upon motion, shall order the prosecuting attorney to furnish a statement of particulars, when the indictment or information upon which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense. Such statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded.

APPENDIX J

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. _____

LEE ANDREW JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

The Petitioner, LEE ANDREW JOHNSON, presents this his Petition for Writ of Certiorari and states:

I

Petitioner seeks to have reviewed a decision of the District Court of Appeal, Fourth District, dated the 8th day of March, 1974, and filed in the Records of said District Court on the 8th day of March, 1974, in Minute Book _____ at Page _____.

II

This Petition is presented under and pursuant to Article Five, Section Four of the Florida Constitution and Rule 4.5(c) of the Florida Appellate Rules.

III

Attached to this Petition is a conformed copy of the decision rendered by the Fourth District Court of Appeal.

Also attached herein is a copy of Volume I of the Record on Appeal; pertinent portions which will be referred to as (R—). Also attached is a copy of the Supplemental Record on Appeal which was considered by the District Court of Appeals, Fourth District, and will be designated as (SR—). Furthermore, copies of the trial transcript that are considered pertinent are attached herein and will be referred as (TR—).

IV

The following are the pertinent facts of this case:

An Information was filed against the Petitioner on May 10, 1972, for one count of sale of heroin (R-1). On May 26, 1972, the Petitioner filed a Motion for Statement of Particulars, asking two questions, to-wit: (1). Please state who was present when the alleged sale of heroin took place and; (2). Please state the exact time and location of the alleged sale (SR-1).

On June 2, 1972, the State Attorney filed his Bill of Particulars and in regard to who was present when the alleged sale took place answered, "Agent James Thomas, BCNDDIEU, and confidential informant present when alleged sale of heroin took place." (SR-2).

The case proceeded to trial on February 21, 1973, and the Petitioner was found guilty of sale of heroin (R-3).

Although the only person the State described as present at the alleged sale was Agent James Thomas, the State presented two separate witnesses, an Agent Lindsay and Agent Clark. Agent Lindsay and Agent Clark testified that they were a car length away when the sale occurred (TR-53-77). Furthermore, Agent Lindsay who was not named in the Bill of Particulars stated during his testimony that he observed the Petitioner "counting something" (TR-68).

Agent Lindsay on cross examination admitted that he never mentioned the counting of anything in his report (TR-68).

Defense counsel cross examined Agent Lindsay as to why this matter was not in his report and whether or not he thought it was important to put it in his report. The following collogue occurred:

> Q. What do you count? What do you usually count? Do you count money?
> A. You can count anything.
>
> Q. Well, didn't you think he was giving him money? Isn't that your opinion?
> A. Yes, it was my opinion, sir.
>
> Q. And you didn't think it was important to put in the report that he was counting something?

At that point the prosecutor made a gratuitous remark in the form of an objection.

> MR. ROBERTS: Your Honor, excuse me. I am going to object to his constant referral to the

report. It is not sworn to. It is given to help. Your Honor, I will ask the jury to be excused.

The essence of the State's objection was that the defense counsel was trying to impeach the witness from his police report.

The Court sustained the State's objection in the following manner (TR-71-72):

THE COURT: Objection sustained. It either is in the report or it isn't in the report and to go any farther, to extend further latitude goes into irrelevance even beyond cross examination.

MR. KAY: Your Honor, I would just for the record proffer that the Defendant, if the Court would allow it, would ask Mr. Lindsay why he did not place in his report that the fact that he had observed the Defendant Johnson, counting something after it was given to him by Bro or Mr. Spies and would explore the reasons for it not having been placed in the report, as to its importance and relevance.

THE COURT: Objection sustained. It is not in there. It is either in there or it isn't in there. Objection sustained.

Escort the jury in."

V

On the foregoing facts the District Court of Appeal of the State of Florida, Fourth District, was presented with the following Points of Law.

(A). DID THE COURT COMMIT ERROR WHEN IT DID NOT EXCLUDE THE TESTIMONY OF TWO STATE WITNESSES WHO WERE PRESENT DURING THE ALLEGED SALE OF HEROIN WHEN THE STATE HAD PREVIOUSLY FILED A BILL OF PARTICULARS CLAIMING THAT THE ONLY PEOPLE PRESENT WERE ANOTHER WITNESS AND A CONFIDENTIAL INFORMANT?

(B). DID THE COURT COMMIT ERROR WHEN IT UNDULY RESTRICTED CROSS EXAMINATION OF A STATE WITNESS IN REGARD WHY HE DID NOT PLACE IN HIS REPORT CERTAIN ESSENTIAL FACTS IN REGARD HIS OBSERVATION OF THE PETITIONER?

On these points of law, the District Court of Appeal of the State of Florida, Fourth District, rendered the following decision, a copy of which is attached hereto:

PER CURIAM.

We have carefully considered the points raised on appeal and upon examination of the record are of the opinion that reversible error has not been demonstrated. Although the information contained in the state's bill of particulars was lacking in completeness we cannot conclude that this error or omission injuriously affected the sub-

stantial rights of the defendant. However, we would point out somewhat critically that the spirit and intent of Rule 3.140(n) is not furthered when the state's response is unduly restrictive. Accordingly, the final judgment of conviction and sentence is affirmed. (Emphasis supplied).

AFFIRMED.

VI

The same point of law as Point (A) is the basis for Rule 3.150(n) of the Florida Rules of Criminal Procedure, said rule having been promulgated by this Honorable Court and being in full force and effect on June 2, 1972, when the State filed its Bill of Particulars, said rule reading:

> (n) Statement of Particulars: The court upon motion, shall order the prosecuting attorney to furnish a statement of particulars, when the indictment or information upon which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense. Such statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant. (Emphasis added).

VII

The same point of law as Point (B) was involved in the case of WALLACE v. STATE, 26 So. 713, decided by this Honorable Court on June 15, 1899. A copy of this decision is attached hereto. The facts involved in WALLACE, supra, are as follows:

There was a desire of defense attorney to ask various questions of State witnesses. The trial court did not allow these questions. Based on these set of facts this Honorable Court held as follows:

> "For the purpose of discrediting a witness, a wide range of cross-examination is permitted, as a matter of right, in regard to his motives, interest, or animus, as connected with the cause or with the parties thereto, upon which matters he may be contradicted by other evidence, * * *".